



Craig S. Donohue  
Chief Executive Officer

October 28, 2010

**VIA ELECTRONIC MAIL**

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581  
agswapsANPR@cftc.gov

Re: Agricultural Swaps ANPRM

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("CFTC" or "Commission") has requested public comment on the appropriate treatment of agricultural swaps under the Commodity Exchange Act ("CEA") as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). See Advanced Notice of Proposed Rulemaking and Request for Comment, 75 Fed. Reg. 59,666 (Sept. 28, 2010) (the "ANPRM"). CME Group appreciates the opportunity to express our views on this issue of importance to our business and to the agricultural community generally. CME Group believes that agricultural commodity swaps should be subject to the same regulation as all other swaps under the CEA as amended by Dodd-Frank. In Appendix A, we also answer the twenty-seven "Questions for Comment" posed by the Commission in the ANPRM.

CME Group is the holding company for four separate exchanges or designated contract markets ("DCMs") subject to the CEA: the Chicago Mercantile Exchange Inc. ("CME"), the Board of Trade of the City of Chicago, Inc. ("CBOT"), the New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX"). Trading and clearing agricultural commodity products is an important part of our business. We offer trading in numerous agricultural commodities, including futures and options contracts on corn, wheat, soybeans, soybean meal, soybean oil, oats, rough rice, cattle, hogs, lumber, and dairy products. In addition, we make clearing available for 12 over-the-counter agricultural contracts on our CME ClearPort clearing platform and have petitioned the Commission for authorization to expand that service. See CME Group Letter to CFTC, Petition for an Exemption to Permit the Clearing of OTC Agricultural Swap Transactions and the Commingling of Customer Funds Used to Margin Such Transactions with Other Funds Held in Segregated Accounts and Participation by Registered CME and CBOT Floor Brokers and Traders as Eligible Swap Participants (June 4, 2010); see also CME Group Inc., Annual Report (Form 10-K) (Feb. 26, 2010).

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### **Part 35 and Dodd-Frank's Authorization for Agricultural Swaps**

Today, Part 35 of the CFTC's regulations provides a broad-based class exemption for certain swap and other derivative agreements in agricultural commodities. The CFTC adopted Part 35 in 1993 under its exemptive authority provided in Section 4(c) of the Commodity Exchange Act ("CEA"). By its terms, Part 35 treats all commodities alike; it applies equally to agricultural and financial commodities. When the CFTC adopted Part 35, it intended "to exempt from regulation (to the full extent permissible by the [CEA]) all swap agreements which satisfy the requirements of the rule and which may otherwise be subject to regulation under the [CEA]." *See Exemptions for Certain Swap Agreements*, 58 Fed. Reg. 5587, 5589 (Jan. 22, 1993).<sup>1</sup>

Part 35 allows parties to enter an OTC swap transaction and still be exempt from almost all CEA provisions (except the antifraud and manipulation provisions), including the exchange trading requirement in CEA § 4(a), if the following conditions are met: i) the swap agreement is entered into solely between sophisticated persons, known as "Eligible Swap Participants"; ii) the swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms; iii) the creditworthiness of any party having an actual or potential obligation under the swap agreement is a material consideration in entering into or determining the terms of the swap agreement; and iv) the swap agreement is not entered into and traded on or through a multilateral transaction execution facility. *See* 17 C.F.R. § 35.2(a)-(d).

With the exception of certain agricultural options and agricultural commodity-specific CEA § 4(c) exemptions the CFTC has granted, Part 35 defines the universe of agricultural swaps that are generally exempt from the CEA's requirements under current law because the statutory exemptions and exclusions enacted in the Commodity Futures Modernization Act of 2000 ("CFMA") do not apply to agricultural commodities. *See* ANPRM at 59,668.<sup>2</sup> Instead, those CFMA provisions are limited to "excluded commodities" and "exempt commodities," categories which expressly do not include any agricultural commodities.

Dodd-Frank takes a very different approach. Section 723(c)(3) prohibits any person from offering, entering into, or confirming the execution of swaps in an "agricultural commodity" **unless** entered into pursuant to a rule, regulation or order of the CFTC pursuant to Section 4(c) of the CEA:

#### **(3) AGRICULTURAL SWAPS.—**

**(A) IN GENERAL.**—Except as provided in subparagraph (B), no person shall offer to enter into, enter into, or confirm the execution of, any swap in an

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<sup>1</sup> The provision was designed to apply to "any swap agreement," including, among others, a "rate swap agreement, basis swap, forward rate agreement, [and] commodity swap." *See* 17 C.F.R. § 35.1(a) and (b)(1)(i).

<sup>2</sup> As a result of the exclusions and exemptions for other swaps, however, Part 35 remains the primary source of CEA exemption only for agricultural swaps. *See* ANPRM at 59,668.

agricultural commodity (as defined by the Commodity Futures Trading Commission).

(B) EXCEPTION.—Notwithstanding subparagraph (A), a person may offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity pursuant to section 4(c) of the Commodity Exchange Act (7 U.S.C. 6(c)) or any rule, regulation, or order issued thereunder (including any rule, regulation, or order in effect as of the date of enactment of this Act) by the Commodity Futures Trading Commission to allow swaps under such terms and conditions as the Commission shall prescribe.

In Dodd-Frank, therefore, Congress departed from its CFMA approach to agricultural OTC derivatives by explicitly allowing agricultural swaps to be entered into at least under the Part 35 criteria, as the Commission confirmed in its ANPRM. *See* ANPRM at 59,668-669. In Dodd-Frank, Congress also expressly has authorized the Commission, again unlike the CFMA, to decide under its exemptive authority whether to treat agricultural commodity contracts that meet the new CEA statutory definition of a "swap" like swaps in all other commodities and thereby effectively repeal the Commission's Part 35 criteria. Given that swap markets in agricultural commodities, while fairly well-developed today, have not had the same longstanding history as interest rate or other forms of swaps, it is understandable that Congress delegated to the Commission the authority to decide whether to subject swaps in agricultural commodities to the new Dodd-Frank regulatory regime for swaps.

In effect, Dodd-Frank appears to give the CFTC three basic choices for agricultural swaps: 1) Retain the status quo—the Part 35 exemption would remain unaltered and parties could still apply for individual exemptions under CEA § 4(c); 2) Develop a specific regulatory regime for agricultural swaps under Section 4(c); or 3) Treat agricultural swaps the same as all other swaps for regulatory purposes under the CEA and repeal Part 35.<sup>3</sup>

On further statutory analysis, only the last two choices are viable; maintaining the status quo would have perverse unintended consequences. As written, once Section 723(c) of Dodd-Frank takes effect, qualifying persons may continue to enter into Part 35 exempt agricultural swaps. Since Part 35 exempts qualifying swaps from almost all other provisions of the CEA, persons who avail themselves of this exemption will be able to side-step key provisions of Dodd-Frank, including its regulation of swap dealers and major swap participants. Agricultural swaps entered into pursuant to Part 35 also would be precluded from clearing and exchange-trading, the exact opposite of the regulatory direction Dodd-Frank intends for all other swaps. We do not believe Congress intended any of these results even if the statutory language literally provides for it. Thus, we expect the Commission will either have to repeal or materially change Part 35 to provide a workable regulatory regime for agricultural swaps in the coming months.

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<sup>3</sup> We acknowledge there is a fourth choice—repeal Part 35 and allow the statute to ban all agricultural swaps. Some might view that outcome as being consistent with forcing all agricultural derivatives trading to be conducted on DCMs like those operated by CME Group. Nevertheless, we do not support that outcome or believe that it merits any level of serious consideration.

CME Group strongly favors the third choice described above: equal treatment for agricultural commodity swaps and repeal of Part 35. Derivatives trading was born in the U.S. two centuries ago in agricultural markets. Agricultural markets are as valuable to our nation's economy as any other, and in many instances more valuable. Statutory regulatory structures and restrictions that are good for other physical commodity swap markets in energy and precious metals, for example, are good for agricultural commodities as well. Dodd-Frank's various mandates on clearing and exchange-trading, transparency, dealer regulation, and amplified business conduct standards should apply to agricultural swaps activities on the same terms as other swaps. Similarly, as with all other swaps, only Eligible Contract Participants ("ECPs")<sup>4</sup> should transact in agricultural commodity swaps unless on a fully-regulated DCM.

Treating agricultural swaps like all other swaps also will promote efficiency both for the Commission and the private sector. The Commission will benefit from the application of a single regulatory framework for swaps, rather than having to develop, administer and enforce a special framework for agricultural commodities. Subjecting agricultural swaps to the Dodd-Frank requirements also will simplify operations and compliance for private sector market participants.

CME Group respectfully requests that the CFTC move quickly to exercise its Section 4(c) authority to promulgate a new rule specifying that agricultural swaps will be treated the same as other types of swaps under the CEA. Expeditious action will guarantee that those with agricultural interests understand they should participate fully in the Commission's development of its implementing Dodd-Frank swap regulations and will avoid confusion in the market place.

### **The Requirements for a Section 4(c) Exemption Are Met**

Section 4(c)(1) of the CEA provides that "[i]n order to promote responsible economic or financial innovation and fair competition, the Commission...may...exempt any agreement, contract, or transaction (or class thereof)" from any provision of the CEA, subject to certain specified exceptions.<sup>5</sup> As a prerequisite to granting relief under 4(c)(1), the Commission must

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<sup>4</sup> As defined in CEA § 1a(12) (to be codified at CEA § 1a(18) pursuant to Dodd-Frank § 721).

<sup>5</sup> The entirety of CEA § 4(c)(1) reads:

"(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (C)(ii) and (D) of section 2 (a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2 (a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest."

determine that: i) the exemption would be consistent with the public interest; ii) any agreement, contract, or transaction affected by the exemption would be entered into by "appropriate persons";<sup>6</sup> and iii) any agreement, contract, or transaction effected by the exemption would not have a material adverse effect on the ability of the CFTC or any DCM to discharge its regulatory or self-regulatory duties under the CEA. Promulgating a broad exception under CEA § 4(c) with respect to agricultural swaps will satisfy these requirements.

1. Giving Agricultural Swaps Equal Treatment is Consistent with the Public Interest

This is the easiest criterion to satisfy. The Commission surely believes that the Dodd-Frank swap regulatory regime is consistent with the public interest. Subjecting agricultural swaps to that same regulatory regime therefore should be presumed to be consistent with the public interest. And it is.

Transactions subject to the CEA serve a "national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." CEA § 3(a). The CEA seeks to advance these interests by, among other things, creating an effective system to regulate market participants, deterring and preventing price manipulation and other disruptions to market integrity, and protecting market participants from fraudulent or abusive practices. *See* CEA § 3(b).

Similarly, Dodd-Frank aims to "promote the financial stability of the United States by improving accountability and transparency in the financial system,"<sup>7</sup> in part by "bring[ing] transparency and greater efficiency to the marketplace for swaps...[and] by requiring the reporting of swap [terms] to market participants." 156 Cong. Rec. S5915 (July 15, 2010) (quoting Senator Reid). These changes are designed to "make the marketplace fairer and more efficient by providing companies and investors with complete information on the market." *Id.* (quoting Senator Reid).

By exercising its authority under CEA § 4(c) and subjecting agricultural swaps to the same regulatory requirements as other swaps, the CFTC will advance the public interests noted above by helping to bring regulation, transparency, and new efficiency to the agricultural swap market. Market participants use agricultural swaps for the same purposes they use other swaps—to hedge exposure to and/or to take a directional view of a particular commodity. Agricultural swaps also serve the same functions as swaps on other physical commodities. Agricultural swap market participants have the same need for efficiency, innovation, liquidity, transparency, and for the reduction of systemic risk as do market participants for other products and commodities. Therefore it makes sense to subject agricultural swaps to the same requirements that other swaps will face under Dodd-Frank.

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<sup>6</sup> As defined in CEA § 4(c).

<sup>7</sup> Quoting the preamble to Dodd-Frank.

Additionally, the U.S. financial markets would benefit if the changes Dodd-Frank makes to the regulation of swaps generally are also applied to agricultural swaps. Specifically, Dodd-Frank imposes a clearing requirement on most standardized swaps and mandates that cleared swaps be executed either on a DCM or a "Swap Execution Facility" ("SEF"), if a DCM or SEF makes the swap available for trading. *See* Dodd-Frank § 723(a)(3). Clearing platforms mutualize risk and, in particular, reduce systemic risk. The use of such platforms also results in other operational efficiencies, such as the consolidation of collateral management and the elimination of the need for novations. Users of agricultural swaps would benefit from these changes, just like users of other swaps. Nothing in the text or legislative history of Dodd-Frank suggests that Congress intended to deprive participants in the agricultural swap markets of the better risk management and liquidity that central clearing can provide.

Acting expeditiously to clarify the status of the agricultural swap markets will also serve the public interest by removing or reducing uncertainty. When the CFTC originally adopted Part 35, the Commission noted that diminishing uncertainty should "promote innovation in the swaps market by allowing participants to negotiate and structure transactions that most effectively address their economic needs." *See* Exemptions for Certain Swap Agreements, 58 Fed. Reg. at 5592. This is no less true today than it was in 1993. Section 723(c) creates uncertainty as to the treatment of agricultural swaps and the market and market participants will benefit if the Commission acts quickly to clarify the treatment of these products. Subjecting agricultural swaps to the same regulatory requirements as other swaps would promote consistency across swap markets and allow participants to play by a single set of known rules.

## 2. Only Appropriate Persons May Trade Swaps Under Dodd-Frank

Applying the same rules to agricultural swaps as to all other types of swaps will also satisfy the second prerequisite for any relief under CEA § 4(c), namely that any agreement, contract, or transaction affected by the exemption must be entered into by "appropriate persons." CEA § 4(c) enumerates certain "appropriate persons," and vests in the CFTC discretion to include "[s]uch other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory processes." *See* CEA § 4(c)(3). When the Commission adopted Part 35, it satisfied this test by limiting the exemption to persons known as "Eligible Swap Participants." *See* Exemptions for Certain Swap Agreements, 58 Fed. Reg. at 5589. As a result, Part 35 prevents, for example, many producers with modest farms from entering into off-exchange swap transactions, while allowing better capitalized entities, like cooperatives and agri-business concerns, to enter into agricultural swaps.

Dodd-Frank's regulatory framework for swaps contains a similar mechanism for ensuring that only appropriate persons enter into these transactions. Specifically, under Dodd-Frank only market participants that qualify as ECPs may trade swaps in the OTC market. If a non-ECP, like a producer with a small farm, wants to enter into a swap, it must do so on, or subject to the rules of, a DCM where it will have the full protections all small and large market participants have

long enjoyed. *See* Dodd-Frank § 723(a) (to be codified at CEA § 2(e)).<sup>8</sup> In the past, the CFTC has determined that only appropriate persons would use an exemption where "the implementation of an exemption...will not erode appropriate regulatory protections." *See* Exemptive Order for SPDR<sup>®</sup> Gold Futures Contracts, 73 Fed. Reg. 31,979, 31,980 (June 5, 2008). In this case, not only will a § 4(c) exemption not erode regulatory protections, but such an exemption would establish additional regulatory protections for agricultural swaps and guarantee that only appropriate persons enter these transactions.

Treating agricultural swaps equally with other swaps would preserve the protections afforded smaller market participants by Part 35. If agricultural swaps are treated like other swaps, only ECPs will be able to enter these swaps in the OTC market while all other agricultural swap participants will benefit from the protections and additional regulation associated with trading swaps on DCMs. Most of the parties who today use Part 35 to enter agricultural swaps will still be able to transact such swaps OTC, while those farmers who do not qualify as ECPs will be able to enter such swaps on a DCM. In short, the Commission will satisfy the appropriate persons test if it treats agricultural swaps the same as other swaps.

### 3. Granting a CEA § 4(c) Exemption Will Not Have a Material Adverse Impact.

The third and final criterion for issuing an exemption pursuant to CEA § 4(c) is that any agreement, contract, or transaction affected by the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA. *See* CEA § 4(c)(b)(ii). In making this determination, Congress intended the CFTC to consider regulatory concerns, including "market surveillance, financial integrity of participants, protection of customers and trade practice enforcement." *See* Exemptions for Certain Swap Agreements, 58 Fed. Reg. at 5592 (quoting legislative history for the Futures Trading Practices Act of 1992). Giving agricultural swaps equal treatment with other swaps, and making them subject to Dodd-Frank's clearing and exchange-trading mandates, would reduce the counterparty risk of these swaps and increase the ability of the Commission and SROs to monitor trading practices.<sup>9</sup>

Applying a single, uniform set of rules to agricultural swaps and other swaps would also likely enable these organizations to fulfill their duties more efficiently. Obtaining 4(c) relief is a time- and labor-intensive process, for both the CFTC staff and the regulated entity seeking an

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<sup>8</sup> The entire provision reads: "(e) LIMITATION ON PARTICIPATION.—It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5."

<sup>9</sup> Our recommended approach would also allow the Commission to make certain that position limits would be applied to agricultural swaps if the Commission decides such limits to be necessary in accordance with new CEA § 4a(a)(1). As explained earlier, the CEA sends mixed, even circular, signals with respect to agricultural swaps because Congress expressly allowed Part 35 to remain in effect and Part 35 exempts swaps from all CEA provisions except antifraud and manipulation. Thus, Part 35 could otherwise be read to exempt agricultural swaps from the position limit regime contemplated in new CEA § 4a(a)(1). By repealing Part 35 and treating agricultural swaps like all other swaps, the Commission would avoid that result.

exemption. Granting broader relief will result in a more appropriate allocation of time and resources for all parties involved. Moreover, DCMs and the CFTC have developed appropriate levels of oversight for the clearing of agricultural products and this experience demonstrates that clearing of OTC-agricultural swaps may co-exist peacefully with listed futures contracts and does not adversely impact the ability of the CFTC or DCM to carry out their statutory duties.

### **Commodity Options**

The Commission's ANPRM presumes that options on physical commodities, as opposed to options on futures contracts, will become swaps under Dodd-Frank: "The Dodd-Frank Act defines the term "swap" to include not only the various types of swaps listed in the definition, including commodity swaps and agricultural swaps, but also OTC options *of any kind*." ANPRM at 59,667 (emphasis added). The Commission reasons that because the swap exclusion refers just to options on futures and does not refer to options on commodities, the latter are swaps. ANPRM at 59,667 n.13 (observing that "[e]xchange-traded futures and options on futures are specifically excluded from the Dodd-Frank swaps definition"). As a result, the ANPRM seems to adopt the view that the Commission's statutory and regulatory provisions will no longer apply to options on physical commodities once the Dodd-Frank provisions take effect.

We do not believe the Commission must read Dodd-Frank to render options on commodities "swaps." Congress left substantial evidence in Dodd-Frank that it did not intend that result. In seven different provisions of Dodd-Frank, Congress referred to "commodity options" or "options on commodities" (not options on futures) for different regulatory purposes; each reference was unnecessary if "options on commodities" were intended to be swaps.<sup>10</sup> Those seven statutory provisions are irreconcilable with the interpretation of the statute that all options on commodities are swaps.

Moreover, case law suggests that when Congress refers to options on futures it actually intends to encompass options on commodities. In the GNMA Options case, the Seventh Circuit Court of Appeals adopted the Commission's position that its exclusive jurisdiction extended to options on GNMA securities, as well as options on GNMA security futures. The court noted that "options on the underlying commodity are sometimes distinguished from options on commodity futures by an adjective such as 'actual,' 'physical' or 'tangible' (e.g., 'option on actual commodity')...but we shall not adopt that convention. In this opinion, 'commodity option' will

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<sup>10</sup> The phrase "options on commodities" appears in the following places: 1) Section 717 (New Product Approval CFTC-SEC Process); 2) Section 718 (Determining Status of Novel Derivatives Products); 3) Section 721 (Definitions of "swap") ("the term 'swap' means any agreement, contract, or transaction -- (i) that is a put, call, cap, floor, collar, or similar option of any kind on the value, of 1 or more interest or other...commodities"); 4) Section 725 (Derivatives Clearing Organizations); 5) Section 737 (Position Limits) (referring to "options on the contracts or commodities").

The phrase "commodity options" appears 6 times, all in Section 721 (Definitions) (in the definitions of "Commodity Pool," "Commodity Pool Operator," "Floor Broker," "Floor Trader," "Futures Commission Merchant," and "Introducing Broker").



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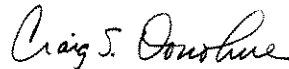
mean an option on the underlying commodity and nothing else." *Board of Trade v. SEC*, 677 F.2d 1137, 1139-40 n.1 (7th Cir.), *vacated on other grounds*, 459 U.S. 1026 (1982). We know of no precedent to the contrary.

For this reason, the Commission may wish to reconsider its apparent view that options on commodities are and must be swaps for purposes of the CEA as amended by Dodd-Frank.

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Dodd-Frank's comprehensive regulation of the swap market should apply with equal force to agricultural commodity swaps and other physical commodity swaps. Not only are agricultural swaps used for the same purposes as other swaps, but nothing in Dodd-Frank's legislative history suggests that Section 723(c) was intended to subject agricultural swaps to unique regulation. In addition, Dodd-Frank permits the CFTC to promulgate a rule under CEA § 4(c) that would require equal treatment of agricultural and other swaps. The CFTC should exercise its discretion and promulgate such a rule because doing so would advance the public interests the CEA and Dodd-Frank are designed to promote. We appreciate the opportunity to comment on this proposal and look forward to working with the Commission throughout this rulemaking process.

Sincerely,



Craig S. Donohue  
Chief Executive Officer

cc: Chairman Gary Gensler  
Commissioner Michael Dunn  
Commissioner Bart Chilton  
Commissioner Jill Sommers  
Commissioner Scott O'Malia

**APPENDIX A – CME Group's Responses to the Commissions Questions for Comment**

*Current Agricultural Swaps Business*

1. How big is the current agricultural swaps business—including both agricultural swaps trading under current part 35 and ATOs under §§ 32.4 and 32.13(g) of the Commission's regulations?
  - While it is difficult to estimate the size of the agricultural swaps market since there are no requirements to report activity in these markets, CFTC's monthly index investment report provides one indication of the size of these markets. The latest report listed on CFTC's website shows a total of approximately \$260 billion in outstanding index investments, of which approximately 60% are agricultural commodities. In addition, CME Group's September volume and open interest report included cleared volume in 12 agricultural commodity swaps of 43,600 contracts year to date. This is likely a very small fraction of the activity in agricultural commodity swaps currently being conducted off exchange that is not cleared.
2. What types of entities are participating in the current agricultural swaps business?
  - Many of the same participants that use CME Group agricultural futures and options contracts also use agricultural swaps for risk management. These include grain trading and processing firms, elevator operators, ethanol producers, energy companies, market makers, and others.
3. Are agricultural swaps/ATO participants significantly different than the types of entities participating in other physical commodity swaps/trade options?
  - CME Group believes that the participants in the agricultural swaps and agricultural trade options markets are not significantly different from the entities that participate in the market for other physical commodity swaps/trade options. Moreover, market participants use agricultural swaps and ATOs in the same way that users of other physical commodity swaps/trade options use those products. Specifically, market participants use agricultural swaps as risk management tools and sometimes also to take a directional view of particular agricultural products.
  - In addition, we are not aware of any clear indications made by Congress during the legislative process that specifically support the notion that farmers are in need of special protection beyond that provided by Dodd-Frank's regulatory framework for swaps, including the limitation on non-ECP trading in swaps to the extent applicable.

*Agricultural Swaps Clearing*

4. What percentage of existing agricultural swaps trading is cleared vs. non-cleared?
  - For commodity index swaps, CME Group offers clearing services for several different indexes offered by Standard and Poors and Dow Jones. Currently, the total notional value of cleared OTC commodity index swaps is less than \$200 million, compared to approximately \$260 billion in notional reported in CFTC's commodity index investment report on August 31, 2010. For individual commodity swaps, the cleared portion is likely even smaller. As mentioned above, CME Group's year-to-date volume of cleared OTC corn, wheat and soybean calendar swaps is 43,600 contracts, which represents approximately \$1 billion in notional value.
5. What percentage of existing agricultural swaps would be eligible for the commercial end-user exemption from the mandatory clearing requirement?
  - Most users of commodity index swaps likely would not qualify for the commercial end user exemption, however, many users of individual commodity swaps such as grain traders and processors and elevator operators likely would qualify for the end-user exemption.
6. What percentage of trading would be subject to the Dodd-Frank clearing requirement, if that requirement applied automatically to agricultural swaps (other than those eligible for the commercial end-user exemption)?
  - The majority of agricultural swaps currently being traded would likely be subject to the clearing requirement. For example, CME Group currently lists for clearing several agricultural contracts on corn, wheat and soybeans through CME ClearPort. These products are standardized and cleared and would likely be subject to the clearing requirement under Dodd-Frank.
7. What would be the practical and economic effect of a rule requiring agricultural swaps transactions (other than those eligible for the commercial end-user exemption) generally to be cleared? The Commission is interested in the views of agricultural swaps market participants (both users and swap dealers) regarding a potential clearing requirement for agricultural swaps.
  - CME Group believes that the Commission should require agricultural swaps to be cleared to the same extent as other swaps. As evidenced by the default-free track record of CME Clearing, central counterparty clearing systems mutualize, and effectively eliminate, systemic risk with respect to the swaps cleared through the system. Requiring clearing would therefore benefit the U.S. financial market generally and should be encouraged.

- Requiring clearing of agricultural swaps would also bring other benefits to the entities trading these products. The existence of effective clearing systems generally reduces the need to evaluate the creditworthiness of each potential counterparty because the clearing house is the buyer to every seller and the seller to every buyer in a cleared trade. As a result, market participants are able to allocate more efficiently their resources.
  - Central counterparty clearing also increases the liquidity of the relevant swap market by diminishing concern over counterparty credit risk. Today, some market participants limit their swap trading to lists of approved counterparties. This decreases the cost of monitoring the creditworthiness of swap counterparties but it also reduces market liquidity by limiting the number of acceptable trading partners. In a clearing system, where the clearinghouse is the counterparty to all trades, the number of acceptable counterparties increases, as does the liquidity available for each trade. *See* CME Group Inc., Annual Report (Form 10-K) (Feb. 26, 2010).
  - Clearinghouses also help control transaction costs by limiting the need for novations. In the OTC market, a party who wishes to novate a trade typically must find a third party willing to take on the trade and obtain the consent of the counterparty to the original trade. This can be a time- and resource-consuming task. Clearing presents an alternative to novating, however, because a position in one swap can effectively be novated by establishing an offsetting position with a different party. *See id.*
  - Clearing of agricultural swaps also enhances capital efficiency for market makers who often use a corresponding exchange-traded futures contract to hedge the swap position since CME Clearing offers margin offsets between the cleared swap and futures contracts.
8. What would be the practical and economic effect of requiring agricultural swaps to be cleared under the Dodd-Frank clearing regime?
- Requiring agricultural swaps to be cleared under the Dodd-Frank clearing regime would reduce the potential for agricultural swaps to create systemic risk. As discussed above, requiring clearing would also likely increase the liquidity and efficiency of the agricultural swaps market, which would benefit swap market participants.
  - More generally, subjecting agricultural swaps to the requirements of Dodd-Frank would advance the public interests that underlie the CEA. Regulating agricultural swaps like all other swaps under Dodd-Frank would remove the need for the costly and time-consuming Part 35 exemption process. This would allow market

participants and the Commission staff to devote resources to other tasks and would establish a stable, constant regulatory regime for agricultural swaps.

### *Trading*

9. Have current agricultural swaps/ATO participants experienced any significant trading problems, including: (a) economic problems (i.e., contracts not providing an effective hedging mechanism, or otherwise not performing as expected); (b) fraud or other types of abuse; or (c) difficulty gaining access to the agricultural swaps market?
  - We are not aware of any trading problems experienced by participants in the agricultural swaps/ATO markets, except that participation in ATO markets has been extremely limited due to the complicated process for complying with ATO rules. Access to calendar swaps for corn, wheat and soybeans was enhanced following CFTC approval of CME Group's 4c and 4d petitions for these products, which allowed them to be offered to eligible contract participants on CME ClearPort.

### *Agricultural Swaps Purchasers*

10. Do agricultural swaps/ATO purchasers need more protections than participants in other physical commodity swaps/trade options?
  - No, agricultural swaps/ATO purchasers do not need more protections than participants in other physical commodity swaps or trade options. In addition, we are not aware of any specific legislative indication that specifically supports the proposition that such entities need additional protections.
11. If so, why, and what should those protections be?
  - CME Group believes agricultural swaps/ATO purchasers do not need more protections than other swap market participants.
12. Would additional protections for agricultural swaps purchasers unduly restrict their risk management opportunities?
  - Yes. Additional protections for agricultural swaps purchasers likely would restrict their risk management opportunities. Requiring additional protection for agricultural swaps purchasers may increase the costs associated with entering such swaps and decrease the liquidity of the agricultural swap market. CME Group believes that Dodd-Frank offers ample protections for all swap market participants and there is no reason to extend additional protections to purchasers of agricultural swaps.

13. Should the Commission consider rules to make it easier for agricultural producers to participate in agricultural swaps—for example, by allowing producers who do not qualify as ECPs to purchase agricultural swaps?
- CME Group believes that agricultural swaps should be subject to the same regulation that other swaps are subject to under the CEA, as amended by Dodd-Frank. Under Dodd-Frank, a non-ECP may enter a swap agreement only if "the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market." See Dodd-Frank § 723(a) (to be codified at CEA § 2(e)). Market participants should have the same ability to engage in agricultural swaps as they do other swaps. Accordingly, non-ECP market participants should be allowed to enter an agricultural swap on, or subject to the rules of, a DCM.
  - To the extent that the Commission proposes to allow non-ECPs to engage in OTC swaps, CME Group believes such a step would be ill-advised. Agricultural swap participants are similar to other swap market participants and agricultural swaps are similar to other types of swaps. As such, the rules and regulations that apply to agricultural swaps should be the same as those that apply to other swaps. Just as we see no reason to restrict trading in agricultural swaps to a greater degree than for other swaps, there is no reason to expand it beyond what the CEA and Dodd-Frank permit for other swaps.

*Designated Contract Markets*

14. Should agricultural swaps transactions be permitted to trade on DCMs to the same extent as all other swaps are permitted on DCMs?
- Yes, CME Group believes that the rules and regulations applicable to non-agricultural swaps should apply with equal force to agricultural swaps, including rules with respect to trading on DCMs.
15. If yes, why?
- Market participants use agricultural swaps for the same purposes as other swaps, i.e., hedging and speculation. DCMs are already subject to comprehensive regulation by the CFTC and this regulation offers a suitable level of protection for those market participants who choose to trade swaps on DCMs.
16. If no, what other requirements, conditions or limitations should apply?
- CME Group believes no other requirements, conditions or limitations should apply.
17. Should agricultural swaps transactions be permitted on SEFs to the same extent as all other swaps are permitted to transact on SEFs?

- Yes, CME Group believes that the rules and regulations applicable to non-agricultural swaps should apply with equal force to agricultural swaps, including rules with respect to trading on SEFs.

18. If yes, why?

- ECPs use agricultural swaps for the same purposes as other swaps, i.e., hedging and speculation, and should have the same tools available for all physical commodity swaps, whether agricultural commodities or not.

19. If no, what other requirements, conditions or limitations should apply?

- CME Group believes no other requirements, conditions or limitations should apply.

*Trading Outside of DCMs and SEFs*

20. Should agricultural swaps be permitted to trade outside of a DCM or SEF to the same extent as all other swaps?

- Yes, CME Group believes that the rules and regulations applicable to non-agricultural swaps should apply with equal force to agricultural swaps, including rules with respect to trading in the OTC market.

21. If yes, why?

- Under Dodd-Frank, only ECPs may transact swaps in the OTC market and most standardized swaps must be cleared and exchange-traded.<sup>11</sup> ECPs can evaluate and manage appropriately the risks associated with OTC swaps and the Commission should not restrict their ability to enter agricultural swaps.
- Moreover, market participants use agricultural swaps for the same purposes that they use other swaps and we are aware of no specific evidence that indicates users of these swaps need more (or fewer) protections than the users of other swaps.
- Over the past decade, the various agricultural constituencies have come to rely more on OTC agricultural products and the technologies that facilitate trading in these products. We have also seen the development of a core group of

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<sup>11</sup> There is an end user exception to the clearing and exchange-trading mandates. Under this exception, certain non-financial companies who use swaps to hedge "commercial risk" have the option to clear and exchange-trade their swaps. See Dodd-Frank § 723(a), (to be codified at CEA § 2(h)(7)). As a technical matter, the OTC market would also include swaps approved for clearing that are currently accepted for clearing by any clearing house and not offered for trading by any DCM or SEF. See Dodd-Frank § 723(a)(3) (to be codified at CEA § 2(h)(8)).

commercial firms who have demonstrated experience in serving as dealers in the OTC market for agricultural swaps. The Commission should allow the OTC agricultural swap market to develop and evolve naturally, just like the OTC market for other commodities.

22. If no, what other requirements, conditions or limitations should apply?
  - CME Group believes no other requirements, conditions or limitations should apply.
23. Should agricultural swaps be permitted to trade outside of a DCM or SEF to a different extent than other swaps due to the nature of the products and/or participants in the agricultural swaps market?
  - No. CME Group believes that agricultural swaps should be permitted to trade outside of a DCM or SEF to the same extent as other swaps.
24. In general, should agricultural swaps be treated like all other physical commodity swaps under Dodd-Frank?
  - Yes, agricultural swap should be treated like all other physical commodity swaps under Dodd-Frank.
25. If yes, why?
  - Dodd-Frank establishes a comprehensive regulatory scheme that both promotes the stability of the U.S. financial system and provides protections for individual market participants. We are aware of no difference between agricultural swaps and swaps in other physical commodities that would require different treatment for agricultural swaps.
26. If no, are there any additional requirements, conditions or limitations not already discussed in other answers that should apply?
  - CME Group believes no other requirements, conditions or limitations should apply.
27. If agricultural swaps are generally treated like swaps in other physical commodities, are there specific agricultural commodities that would require special or different protections?
  - CME Group believes agricultural swaps should be treated identically with other swaps. There are no specific agricultural commodities that would require special or different protections.